Tean Yee Mooy v White Horse Marketing Sdn Bhd and another appeal

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NOS WA-16A-56–09 OF 2023 AND WA-16A-55–09 OF 2023
AMARJEET SINGH J
7 JUNE 2024

Labour Law — Constructive dismissal — Reference of dispute to Director General of Industrial Relations — Failed conciliation as reinstatement offered by employer rejected by employee — Reference of dispute to Industrial Court — Industrial Court struck out employee's case upon employer's application — Whether Industrial Court seized with jurisdiction to strike out case — Whether there were triable issues of fact and law — Industrial Relations Act 1967 ss 20, 29(fa) & 54(3)

Industrial Court — Jurisdiction — Striking out of statement of case — Claim for constructive dismissal — Industrial Court struck out employee's case upon employer's application — Whether Industrial court erred in deciding dispute settled at conciliation stage — Whether Industrial Court seized with jurisdiction to strike out case — Whether there were triable issues of fact and law — Whether Industrial Court obliged to decide dispute — Whether Industrial Court acted in excess of jurisdiction by striking out statement of case — Whether O 18 r 19 of Rules of Court 2012 could be utilised at Industrial Court

The appellant ('claimant') commenced employment with the respondent ('company') as a Sales Executive in 1995. Sometime in 2021, the claimant was informed that due to the restructuring of the company, the claimant was being transferred from her current position to the position of Senior Sales Executive at her election at either the Kuala Lumpur branch or the Kota Bahru branch. The claimant, alleging that the transfer was done in bad faith and a facade to force her out of the company, considered herself as constructively dismissed by the company. The claimant then referred the matter to the Director General of Industrial Relations ('DG') under s 20 of the Industrial Relations Act 1967 ('the IRA') where parties attended a conciliation meeting. As a result, the company offered to reinstate the claimant to her original position with the same salary and benefits. The claimant disagreed with the company's meaning of reinstatement and averred that the reinstatement must be an 'absolute reinstatement'. When the claimant did not turn up for work as per the reinstatement offer letter, the company treated the claimant as having voluntarily resigned. As the reconciliation had failed, the GD referred the matter to the Industrial Court for adjudication. The company, however,

applied to strike out the claimant's statement of case, pursuant to s 29(fa) of the IRA read with O 18 r 19(1) of the Rules of Court 2012 ('the ROC'). The Industrial Court allowed the company's application. Hence the present appeal. The issues that arose for determination were: (a) whether ROC could be utilised in the Industrial Court; (b) whether the reinstatement was genuine; and (c) whether the claimant's statement of case was unsustainable.

Held, allowing the appeals:

(1) The decision of the Chairman in striking out the statement of case under s 29(fa) of the IRA was based on a misdirection of the law, which amounted to an appealable error justifying interference by the court. The court proffered no view whether O 18 r 19 of the ROC could be utilised in the Industrial Court (see para 24).

(2) The reason the Industrial Court in allowing the application to strike out the statement of case was on the sole reason that the employer had offered reinstatement to the same position with salary and entitlement as before the dispute. The offer of reinstatement resolves the dispute of dismissal, in this case, constructive dismissal. The decision of the Industrial Court, in essence, meant that the reference to the Industrial Court was bad in law. It could not be gainsaid that the jurisdiction of the Industrial Court was that provided by the provisions of the IRA. The reference by the Director General was made to the Industrial Court when the Director General was satisfied that there was no likelihood of settlement under s 20(3) of the IRA, otherwise known as the threshold jurisdiction (see paras 26–27).

(3) It was clear that the Industrial Court had no jurisdiction to do what it did. The scheme of the IRA read as a whole was that once a dispute had been referred by the Director General to the Industrial Court, the same was at once invested with jurisdiction and was obliged to decide the dispute one way or another, ie, whether there was a dismissal and if there was a dismissal, whether the dismissal was without just cause and excuse. The Industrial Court, by acceding to the striking out application, had acted in excess of jurisdiction and its decision could not be stand and was accordingly set aside. Where a challenge was not taken against the reference, the Industrial Court was required to decide the dispute to a conclusion. The Industrial Court could not decline jurisdiction even if it was of the opinion that the dispute was settled. Thus, there was a clear misdirection of the law on the part of the Industrial Court which warranted appellate interference (see para 30).

(4) On the facts of the case, the issue of reinstatement was in dispute. The Chairman was not permitted to resolve serious disputes of fact and law in a striking out proceeding. The question of whether the reinstatement was genuine or not was obviously a triable issue for the Industrial Court.

The claimant may have coined the phrase 'absolute reinstatement' but in industrial relations law, the issue was whether there was a genuine reinstatement. This was a question of fact and law and something that could not be determined in a striking out application. The determination could only be decided after evidence was led at the trial when the dispute was adjudicated. Further, the fact of restructuring of the company and decentralisation exercise of the various departments that had been carried out by the company. These were all questions to determine whether there was a genuine reinstatement or otherwise (see paras 31–32).

(5) What was prohibited was the giving of evidence of matters that transpired in a conciliation proceeding or the evidence concerning negotiations at a conciliation proceeding except a written statement in relation thereto agreed to and signed by the parties to the dispute. An offer made had different considerations. These issue of an offer to reinstate was for the Industrial Court to decide and not in striking out proceedings. Therefore, the Chairman erred in law and fact in deciding the disputed facts on affidavit evidence. The Chairman failed to apply the correct test ie, whether the claimant's statement of case was obviously unsustainable. In the circumstances, both appeals were allowed. Further, the interim award and the final award made by the Industrial Court was set aside. The matter was remitted to the Industrial Court for a full hearing on the merits of the dispute (see paras 33–34).

[Bahasa Malaysia summary

Perayu ('penuntut') mula bekerja dengan responden ('syarikat') sebagai eksekutif jualan pada tahun 1995. Pada tahun 2021, penuntut dimaklumkan bahawa disebabkan penstrukturan semula syarikat, penuntut telah dipindahkan daripada jawatannya sekarang ke jawatan Eksekutif Jualan Kanan mengikut pilihan beliau sama ada di cawangan Kuala Lumpur atau cawangan Kota Bahru. Penuntut, mendakwa bahawa pemindahan itu dilakukan dengan niat jahat dan fasad untuk memaksanya keluar daripada syarikat, menganggap dirinya telah dipecat secara konstruktif oleh syarikat. Penuntut kemudian merujuk perkara itu kepada Ketua Pengarah Perhubungan Perusahaan ('DG') di bawah s 20 Akta Perhubungan Perusahaan 1967 ('IRA') di mana pihak menghadiri mesyuarat perdamaian. Sebagai akibat, syarikat menawarkan untuk mengembalikan semula penuntut ke jawatan asalnya dengan gaji dan faedah yang sama. Penuntut tidak bersetuju dengan maksud pengembalian semula syarikat dan menegaskan bahawa pengembalian semula mestilah 'pengembalian semula mutlak'. Apabila penuntut tidak hadir bekerja seperti dalam surat tawaran pengembalian semula, syarikat menganggap penuntut telah meletak jawatan secara sukarela. Oleh kerana perdamaian telah gagal, GD merujuk perkara itu kepada Mahkamah Perusahaan untuk penghakiman. Syarikat itu, bagaimanapun, memohon untuk membatalkan penyataan kes

penuntut, menurut s 29(fa) IRA yang dibaca dengan A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Mahkamah Perusahaan membenarkan permohonan syarikat itu. Oleh itu rayuan semasa. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada ROC boleh digunakan di Mahkamah Perusahaan; (b) sama ada pengembalian semula itu adalah benar; dan (c) sama ada pernyataan kes pihak menuntut tidak dapat dipertahankan.

Diputuskan, membenarkan rayuan:

(1) Keputusan Pengerusi dalam menolak pernyataan kes di bawah s 29(fa) IRA adalah berdasarkan salah arah undang-undang, yang merupakan kekhilafan boleh dirayu yang mewajarkan campur tangan oleh mahkamah. Mahkamah tidak memberikan pandangan sama ada A 18 k 19 KKM boleh digunakan di Mahkamah Perusahaan (lihat perenggan 24).

(2) Alasan Mahkamah Perusahaan membenarkan permohonan untuk membatalkan pernyataan kes adalah atas sebab tunggal majikan telah menawarkan pengembalian semula ke jawatan yang sama dengan gaji dan kelayakan seperti sebelum pertikaian. Tawaran pengembalian semula menyelesaikan pertikaian pemecatan, dalam kes ini, pemecatan konstruktif. Keputusan Mahkamah Perusahaan, pada dasarnya, bermakna rujukan kepada Mahkamah Perusahaan adalah buruk dari segi undang-undang. Ia tidak boleh dinafikan bahawa bidang kuasa Mahkamah Perusahaan adalah yang diperuntukkan oleh peruntukan IRA. Rujukan oleh Ketua Pengarah dibuat kepada Mahkamah Perusahaan apabila Ketua Pengarah berpuas hati bahawa tiada kemungkinan penyelesaian di bawah s 20(3) IRA, atau dikenali sebagai bidang kuasa ambang (lihat perenggan 26–27).

(3) Ia adalah jelas bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk melakukan apa yang dilakukannya. Skim IRA yang dibaca secara keseluruhan ialah sebaik sahaja pertikaian telah dirujuk oleh Ketua Pengarah kepada Mahkamah Perusahaan, perkara yang sama diberikan dengan bidang kuasa dan bertanggungjawab untuk memutuskan pertikaian itu melalui satu cara atau yang lain, iaitu, sama ada terdapat pemecatan dan jika berlaku pemecatan, sama ada pemecatan itu tanpa sebab dan alasan yang adil. Mahkamah Perusahaan, dengan membenarkan permohonan pembatalan, telah bertindak melebihi bidang kuasa dan keputusannya tidak dapat dipertahankan dan sewajarnya diketepikan. Di mana cabaran tidak diambil terhadap rujukan itu, Mahkamah Perusahaan dikehendaki memutuskan pertikaian itu kepada satu kesimpulan. Mahkamah Perusahaan tidak boleh menolak bidang kuasa walaupun berpendapat pertikaian itu telah

diselesaikan. Oleh itu, terdapat salah arah undang-undang yang jelas di pihak Mahkamah Perusahaan yang memerlukan campur tangan rayuan (lihat perenggan 30).

(4) Mengenai fakta kes, isu pengembalian semula menjadi pertikaian. Pengerusi tidak dibenarkan menyelesaikan pertikaian fakta dan undang-undang yang serius dalam prosiding pembatalan. Persoalan sama ada pengembalian semula itu adalah benar atau tidak jelas merupakan isu yang boleh dibicarakan oleh Mahkamah Perusahaan. Penuntut mungkin telah mencipta frasa 'pengembalian semula mutlak' tetapi dalam undang-undang perhubungan industri, isunya ialah sama ada terdapat pengembalian semula yang benar. Ini adalah persoalan fakta dan undang-undang dan sesuatu yang tidak dapat ditentukan dalam permohonan pembatalan. Penentuan hanya boleh diputuskan selepas keterangan dikemukakan pada perbicaraan apabila pertikaian itu diadili. Tambahan pula, fakta penstrukturan semula syarikat dan pelaksanaan desentralisasi pelbagai jabatan yang telah dijalankan oleh Syarikat. Ini semua soalan untuk menentukan sama ada terdapat pengembalian semula yang benar atau sebaliknya (lihat perenggan 31–32).

(5) Apa yang dilarang ialah memberi keterangan mengenai perkara yang berlaku dalam prosiding perdamaian atau keterangan mengenai rundingan dalam prosiding perdamaian kecuali pernyataan bertulis berhubung dengannya yang dipersetujui dan ditandatangani oleh pihak-pihak dalam pertikaian. Tawaran yang dibuat mempunyai pertimbangan yang berbeza. Isu tawaran untuk mengembalikan semula ini adalah untuk Mahkamah Perusahaan putuskan dan bukannya prosiding pembatalan. Oleh itu, Pengerusi terkhilaf dari segi undang-undang dan fakta dalam memutuskan fakta yang dipertikaikan pada keterangan afidavit. Pengerusi gagal menggunakan ujian yang betul iaitu, sama ada pernyataan kes penuntut jelas tidak dapat dipertahankan. Dalam keadaan itu, kedua-dua rayuan dibenarkan. Selanjutnya, award interim dan award akhir yang dibuat oleh Mahkamah Perusahaan telah diketepikan. Perkara itu telah diserahkan kepada Mahkamah Perusahaan untuk perbicaraan penuh atas merit pertikaian (lihat perenggan 33–34).]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685; [1997] 3 CLJ 777, SC (folld)

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622; [2021] 4 CLJ 821, FC (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 20(1), (3), 29(fa), 33C, 54, 54(3)
Rules of Court 2012 O 18 r 19(1)

Chandrasegaran a/l Rajandran (Prem & Chandra) for the appellant.
Na Yi Lun (with Florence Toh Teng Teng and Pang Jia Shin) (William, Florence & Partners) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] The appellant, Tean Yee Mooy claimed she was constructively dismissed by her employer, the respondent (White Horse Marketing Sdn Bhd). She brought a claim for dismissal without just cause and excuse under s 20 of the Industrial Relations Act 1967 ('the IRA'). (Hereinafter, the appellant and respondent will be referred to as they were before the Industrial Court, as the 'claimant' and 'company' respectively).

[2] At the Industrial Court, after pleadings were closed, the company took out an application to strike out the claimant's statement of case under O 18 r 19(1) of the Rules of Court 2012 read with s 29(fa) of the IRA. The learned Chairman of the Industrial Court ('the learned Chairman') allowed the application as shown in the interim award dated 23 August 2023. In view that the case was struck out, the Industrial Court, on 29 August 2023, issued the final award dismissing the applicant's case.

[3] Aggrieved with the awards, the claimant filed two appeals in the High Court pursuant to s 33C of the IRA. Appeal No WA-16A-55–09 of 2023 is against the interim award and Appeal No WA-16A-56–09 of 2023 is against the final award. Both appeals were heard together as my decision in respect of the interim award would determine the final award.

[4] I allowed both appeals and made an order remitting the matter back to the Industrial Court to be heard on the merits. This judgment contains the reasons for my decision.

BACKGROUND FACTS

[5] The claimant commenced employment with the company as a sales executive on 1 September 1995 and was promoted to senior marketing executive effective from 1 February 2008. Apart from the basic monthly salary, the claimant was also paid the monthly variable component as well as sales commission based on the team sales collection.

[6] On or about 23 November 2021, the claimant and other employees were offered an early retirement scheme due to a purported restriction and decentralisation within the National Marketing Division of the company. The claimant said that her immediate superior, the National Marketing Manager ('NMM') called her for a meeting to persuade her to opt for the proposed retirement scheme and had also sent her a letter via email which purportedly was addressed by her to the company to inform the company that she had opted for the early retirement scheme and that her last working day would be on the 31 December 2021. The claimant refused the early retirement scheme and ignored the letter.

[7] However, on 26 November 2021, the NMM made a false announcement in the marketing department's WhatsApp chat group which stated that the claimant had opted for early retirement and that her last working day was 31 December 2021. On the same day, the General Manager who was also NMM's superior confirmed the same.

[8] The claimant, immediately responded by letter dated 1 December 2021 to the Senior Human Resources Manager ('SHRM') of the company. She informed that she had not opted for the early retirement scheme as alleged by NMM and the General Manager. She complained that NMM had threatened her that if she did not opt to retire early, she would be transferred to some remote branch of the company. She said that the actions of the NMM and the General Manager are heading towards her constructive dismissal from the company. She added that she reserving her legal rights pending her employment status by the company.

[9] On 20 December 2021, the SHRM reverted by letter informing the claimant that the incident concerning the optional retirement scheme was a misunderstanding between NMM and the General Manager and that the scheme had been aborted. However, the SHRM went on to state that given the restructuring of the company, the claimant was being transferred from her current position to the position of senior sales executive at her election at either the Kuala Lumpur branch or the Kota Bahru branch. The SHRM also added that if the claimant does not make an election she would automatically be assigned to the Kuala Lumpur branch effective 1 January 2022. On the claimant's request the SHRM, in a letter dated 28 December 2021, informed the particulars of her salary and allowances which remained the same, save for her position which is changed from senior marketing executive to senior sales executive on the same grade, and that her commission will now be based on sales collection.

[10] On 3 January 2022, the claimant responded that she would comply with the transfer but requested that she be given her earlier post of senior

marketing executive with her justification for the same. However, the crucial part of her letter was that she considered the new position given a downgrade ie from the national level to the branch level, and that her commission would be severely affected. She alleged that the transfer was done in bad faith and a facade to force her out of the company. She concluded by stating that if she had not reverted to her original position as a senior marketing executive, she would have considered herself constructively dismissed.

[11] On 10 January 2022 at 8.16am, the claimant informed the company via email that she considered herself constructively dismissed. On the same day at about 11.45am, the applicant received a letter dated 9 January 2022 informing that she was reinstated as senior marketing executive as per her request with the same entitlements and benefits. However, the claimant treated the letter which arrived at 11.45am as 'out of time' and ignored the same.

[12] On 13 January 2022, the claimant referred the matter to the Director General of Industrial Relations ('the Director General') under s 20 of the IRA. The parties attended a conciliation meeting where the company offered by letter dated 28 January 2022 to reinstate the claimant to her original position with the same salary and benefits. The company offered reinstatement with the same salary and benefits but again the claimant refused the same by letter dated 31 January 2022 on the basis that she would not be put back to her original position for the reasons she proffered therein. The company by letter dated 8 February 2022 clarified that her reinstatement was complete.

[13] In a letter dated 9 February 2022, the claimant disagreed with the company's meaning of reinstatement and said that the reinstatement must be an 'absolute reinstatement' as per her earlier proffered reasons. The claimant's notion of 'absolute reinstatement' is that in addition to the exact position, salary and entitlements as senior marketing executive are the following:

(a) her immediate superior officer must be the National Marketing Manager regardless of who holds the position or will hold the position;

(b) her workplace or work area must include all branches throughout Malaysia; and

(c) other implied terms that should have been given to her as an employee for 26 years.

[14] It is important to note that one of the reasons the claimant gave for the reinstatement not being genuine was that the whole marketing department had already been decentralised to branches and this would impact her sales commissions.

[15] When the claimant did not turn up for work on 10 February 2022 as per the reinstatement offer letter, the company treated the claimant as having 'voluntarily resigned'. The Director General accepted the fact that the conciliation failed and this was borne out by the reference he made for the matter to be adjudicated by the Industrial Court.

AT THE INDUSTRIAL COURT

[16] At the Industrial Court, after pleadings were settled, the company filed an application to strike out the claimant's statement of case under s 29(fa) of the IRA read with O 18 r 19(1) of the Rules of Court 2012. The application was supported by an affidavit. The application was based on the established grounds of striking out a pleading, namely:

(a) the statement of case discloses no reasonable cause of action;

(b) the statement of case may prejudice, embarrass, or delay the fair trial of the action; and

(c) the statement of the case is an abuse of process of the court.

[17] In the main, the reason for the application was that the company had offered reinstatement on two occasions and both were rejected. To recap, the first offer for reinstatement was dated 9 January 2022 which the claimant rejected being out of time and the second was on the very day of reconciliation at the Industrial Relations Department ie 28 January 2022. The claimant had 'obviously voluntarily resigned' by not turning up for work. In the circumstances the claim is groundless. In other words, an abuse of the process of the court.

[18] To the company, the 'reinstatement' means giving back the employee the position she was dismissed from without loss of salary and benefits which is what the term means in industrial relations law. The dispute comes to an end when there is an offer of reinstatement according to the conditions as understood in industrial relations law. The rejection of the offer of reinstatement was unreasonable. This the company said they had done. In the instant case, the company claims that despite giving back the claimant her original position without loss of salary and benefits the claimant refuses to report for duty. The company treated the claimant's refusal to report for duty as a voluntarily resignation.

[19] The claimant opposed the application and in her affidavit in reply denied that she had voluntarily resigned and contended that she was constructively dismissed. She alleges that the offer for reinstatement does not put her back to her original position although the same job description is offered to her with the same salary and benefits. She claimed that the

reinstatement must be 'absolute reinstatement' which includes has to return to work as she had left with the same job scope, with her superior being the National Marketing Manager, not the Regional Marketing Manager in place now, the same work area which include branches throughout Malaysia and other implied terms that should be given to an employee who has served 26 years with the company and an entitlement to yearly bonus although she accepts that bonus is at the discretion of her employer depending on various factors.

Decision of the Industrial Court

[20] The learned Chairman after considering the respective written submissions and the cause papers allowed the application to strike out and struck out the statement of case and thereafter the entire claim. His reasons were as follows:

(a) the evidence shows that before the instant reference was received by the Industrial Court, the dispute had already been resolved when at the conciliation proceedings before the Industrial Relations Department the company had agreed to reinstate the claimant with effect from 10 February 2022 with no loss of salary and benefits;

(b) thus, the dispute from matters leading up to the claimant treating herself as being constructively dismissed has been resolved by the said offer of reinstatement. The reinstatement to the original position with no loss of salary and benefits settles the dispute. The dismissal or constructive dismissal is no longer in issue;

(c) the claimant's version in her affidavit in reply was more geared towards her expressions of heart and feelings which were based on emotions and speculations as well as bad impressions of the company without credible facts and evidence;

(d) the letter dated 31 January 2022 by the claimant was a rejection of the company's offer of reinstatement vide letter dated 28 January 2022 based on expended conditions other than reinstating the applicant to her original position as understood under s 20 of the IRA; and

(e) the dispute had been resolved at the conciliation conducted by the Selangor Industrial Relations Department when the claimant was offered reinstatement to her original position by the company.

[21] Hence, this appeal is before me.

A THE GROUNDS OF APPEAL

[22] The grounds of appeal are found in the memorandum of appeal which can be summarised as follows:

B (a) the learned Chairman erred in law and fact in allowing the application to strike out the statement of case under s 29(fa) of the IRA read with O 18 r 19(1) of the Rules of Court 2012, without a full trial;

(b) the learned Chairman erred in law and fact in failing to hold that the proper course would have been to challenge the reference made by the C Director General and not striking out the statement of the case;

(c) the learned Chairman erred in law and fact in holding that in light of the offer for reinstatement back to the claimant's original position with salary and benefits the issue of constructive dismissal has been resolved as D envisaged by s 20 of the IRA;

(d) the learned Chairman erred in law and fact by failing to consider s 54 of the IRA when holding that the offer for reinstatement back to the claimant's original position with salary and benefits the issue of constructive dismissal has been resolved; and E

(e) the learned Chairman erred in law and fact in holding that the offer of reinstatement was a genuine offer when there were other matters with regard to reinstatement not satisfied ie the reinstatement was not genuine.

F *Analysis and decision*

[23] The function of the court exercising appellate jurisdiction on appeal is trite. The duty of the court is to determine whether or not the trial court had G arrived at its decision or finding correctly on the basis of the relevant law and/or established evidence or is plainly wrong in arriving at its decision (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622; [2021] 4 CLJ 821).

H **[24]** I am of the view that the decision of the learned Chairman in striking out the statement of case under s 29(fa) of the IRA is based on a misdirection of the law which amounts to an appealable error justifying interference by this court. In this regard, I proffer no view whether O 18 r 19 of the Rules of Court I 2012 can be utilised in the Industrial Court.

[25] Having said that, there are two reasons for my decision: (a) the Industrial Court has no jurisdiction to strike out the case on the grounds that the dispute was settled at the conciliation stage, and (b) there were triable issues

of fact and law on the issue of whether the reinstatement was a genuine reinstatement and as such the statement of the case was not one that was obviously unsustainable.

No jurisdiction to strike out

[26] The reason the Industrial Court in allowing the application to strike out the statement of case was on the sole reason that the employer had offered reinstatement to the same position with salary and entitlement as before the dispute. The offer of reinstatement resolves the dispute of dismissal, in this case, constructive dismissal.

[27] The decision of the Industrial Court, in essence, means that the reference to the Industrial Court was bad in law. This decision begs the question of whether the Industrial Court has jurisdiction to do what it did. It cannot be gainsaid that the jurisdiction of the Industrial Court is that provided by the provisions of the IRA. The reference by the Director General is made to the Industrial Court when the Director General is satisfied that there is no likelihood of settlement under s 20(3) of the IRA, otherwise known as the threshold jurisdiction. Section 20(3) of the IRA read as follows:

> Where the Director General is satisfied that there is no likelihood of the representations being settled under subsection (2), the *Director General shall refer the representations to the Court for an award.*

[28] The Supreme Court in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685; [1997] 3 CLJ 777 held that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the very limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order for prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. The Industrial Court has no jurisdiction to question the reference or determine the question whether the decision of the Minister was lawful. That is the question for the High Court in a judicial review proceeding. For avoidance of doubt, the first reinstatement at the request of the claimant which the latter said was out of time is still open for consideration by the Industrial Court at the trial as well as the question of whether the offer of reinstatement at the conciliation stage is allowed or not under s 54(3) of the IRA.

[29] Now, whilst the decision of *Kathiravelu Ganesan* was decided prior to the coming into force of s 29(fa) of the IRA on 28 February 2008, the ratio decidendi is still applicable with the amendments to ss 20 and 29(fa) of the

IRA. Section 29(fa) cannot overrule the ratio decidendi in *Kathiravelu Ganesan.* Whether it was, the Minister previously or the Director General presently, the company was asking the Industrial Court to, in substance, ignore the reference on the basis that there was an offer of genuine reinstatement which confers threshold jurisdiction on the Industrial Court. This cannot be done without challenging the Director General's decision in making the reference and in the same application seeking an order for prohibition against the Industrial Court from entertaining the dispute.

[30] It is clear that the Industrial Court has no jurisdiction to do what it did. The scheme of the IRA read as a whole is that once a dispute has been referred by the Director General to the Industrial Court, the same is at once invested with jurisdiction and is obliged to decide the dispute one way or another ie whether there was a dismissal and if there is a dismissal, whether the dismissal was without just cause and excuse. The Industrial Court, by acceding to the striking out application, had acted in excess of jurisdiction and its decision cannot be stand and is accordingly set aside. Where a challenge is not taken against the reference, the Industrial Court is required to decide the dispute to a conclusion. The Industrial Court cannot decline jurisdiction even if it is of the opinion that the dispute was settled. Thus, there was a clear misdirection of the law on the part of the Industrial Court which warrants appellate interference.

The matter is not obviously unsustainable

[31] In the matter before me, a perusal of the affidavits reveals that the issue of reinstatement was in dispute. The learned Chairman is not permitted to resolve serious disputes of fact and law in a striking out proceeding. The question of whether the reinstatement was genuine or not is obviously a triable issue for the Industrial Court. The claimant may have coined the phrase 'absolute reinstatement' but in industrial relations law, the issue is whether there was a genuine reinstatement. This is a question of fact and law and something that cannot be determined in a striking out application.

[32] The determination can only be decided after evidence is led at the trial when the dispute is adjudicated. The matter in the instant case is further compounded by the fact of restructuring of the company and decentralisation exercise of the various departments that had been carried out by the company. These are all questions to determine whether there was a genuine reinstatement or otherwise. Further, there are issues regarding whether s 54(3) of the IRA is applicable to admit evidence of the reinstatement offered at the conciliation stage. Section 54(3) of the IRA provides as follows:

> No evidence shall be given in proceedings before the Court with regard to any offer relating to any matter connected with the trade dispute made without prejudice by

any person or trade union *except with the consent of that person or trade union.* (Emphasis added.)

[33] What is prohibited is the giving of evidence of matters that transpired in a conciliation proceeding or the evidence concerning negotiations at a conciliation proceeding except a written statement in relation thereto agreed to and signed by the parties to the dispute. As shown above, an offer made has different considerations. These issue of an offer to reinstate is for the Industrial Court to decide and not in striking out proceedings. Therefore, the learned Chairman erred in law and fact in deciding disputed facts on affidavit evidence. The learned Chairman failed to apply the correct test ie whether the claimant's statement of case was obviously unsustainable.

CONCLUSION

[34] For the aforesaid reasons, I allow both the appeals and set aside the interim award and the final award made by the Industrial Court. The matter is remitted to the Industrial Court for a full hearing on the merits of the dispute.

Appeals allowed.

Reported by K Selvaraju